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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL DESIGN CONCEPTS, LLC,	:	
	:	05 CV 4754 (PKC)
Plaintiff,	:	
	:	[ECF CASE]
-against-	:	
	:	
SAKS INCORPORATED and SAKS FIFTH AVENUE, INC.,	:	
	:	
Defendants.	:	

OSCAR DE LA RENTA, LTD.'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF

PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Oscar de la Renta, Ltd. ("ODLR, Ltd.") in support of its motion, pursuant to Rule 24(a) of the Federal Rule of Civil Procedure ("Fed. R. Civ. P."), to intervene as of right as a plaintiff in this action, or in the alternative, pursuant to Rule 24(b) of the Fed. R. Civ. P., for leave to intervene as a plaintiff in this matter at the Court's discretion.

At issue in this action are the monies that Saks Inc. and Saks Fifth Avenue (collectively, "Saks") allegedly owes to IDC, as the purported assignee of Apparel Group International, LLC ("AGI"), due to allegedly improper chargebacks and deductions on goods sold to Saks by AGI bearing the ODLR, Ltd. trademark. Intervention by ODLR, Ltd. in the instant action is necessary to protect ODLR, Ltd.'s interest in, and claim to, the monies being sought by IDC from Saks in this action.

In a related-matter currently pending before the Supreme Court of the State of New York, New York County, entitled Oscar de la Renta, Ltd. v. HSBC Bank U.S.A., N.A., International Design Concepts LLC, Sadimara Knitwear, Inc. and Apparel Group International, LLC, Index No. 602563/05 (the "ODLR Action"), ODLR, Ltd. has asserted a claim to entitlement to these very funds based upon theories of fraudulent conveyance, successor liability, and royalties owed under a license agreement between ODLR, Ltd. and AGI. Saks, however, has taken the position in this action that it "will be subject to a substantial risk of multiple or inconsistent obligations by reason of [ODLR, Ltd.'s] claimed interest in the monies that IDC seeks from Saks in this action." See infra at 5. Additionally, ODLR, Ltd. has already obtained judgment against IDC's predecessors, AGI and Sadimara, in the principal amount of $1,008,904.16 and has commenced a fraudulent conveyance action against IDC, AGI and Sadimara based upon the transaction that allegedly conveyed the very claims that IDC is now pursuing against Saks. OLDR, Ltd. runs the very real risk that those funds will be dissipated by IDC. Accordingly, ODLR, Ltd. should be permitted to join this action as a plaintiff pursuant to either Rule 24(a) or Rule 24(b) of the Fed. R. Civ. P. so that the rights and liabilities of the parties to any settlement or judgment in favor of IDC and against Saks can be determined by this Court.

STATEMENT OF FACTS

The Court is respectfully referred to the accompanying January 15, 2007 affidavit of Richard G. Tashjian ("Tashjian Aff.") and the exhibits attached thereto for a discussion of the salient facts and procedural history.

ARGUMENT

I.
ODLR, LTD. SHOULD BE ALLOWED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(A)

Pursuant to Fed. R. Civ. P. Rule 24(a), which should be liberally construed, a party shall be permitted to interevene in an action as of right:

> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. Rule 24(a)(2); Tatum v. Cardillo, 11 F.R.D. 585, 587 (S.D.N.Y. 1951). To intervene as of right, a party must (i) timely file an application; (ii) show an interest in the action; (iii) demonstrate the interest may be impaired by the disposition of the action; and (4) show that the interest is not protected adequately by the parties to the action. See Buxbaum v. Deutsche Bank AG, 216 F.R.D. 72, 76 (S.D.N.Y. 2003) (Koeltl, J.). In considering a motion for intervention, the Court must balance the objective of "efficiently administering legal disputes by resolving all related issues in one lawsuit" with the objective of "keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged." U.S. v. Pitney Bowes, 25 F.3d 66, 69 (2d Cir. 1994). ODLR, Ltd. respectfully submits that it meets the standard under Rule 24(a)(2) allowing intervention as of right.

A. ODLR, Ltd.'s Application is Timely

Whether an application for intervention is timely is a matter within the sound discretion of the trial court based upon all the circumstances. Buxbaum, 216 F.R.D. at 76. Factors to be considered are how long the applicant had notice of the interest before making the motion; any prejudice that might result to the existing parties resulting from any delay; any prejudice to the applicant if the motion is denied; and any unusual circumstances militating in favor or against intervention. Buxbaum, 216 F.R.D. at 76. A motion to intervene is not necessarily untimely even when it was filed almost two years after the movant became aware of its interest in the case. See Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd., 782 F.Supp. 870, 874 (S.D.N.Y. 1991). Rather, the most important factor in deciding timeliness is prejudice to the existing parties. See Meyer v. MacMillan Publishing Co., Inc., 85 F.R.D. 149, 150 (S.D.N.Y. 1980) (granting intervention where motion to intervene made five years after original complaint filed on grounds no prejudice shown); Miller v. Silbermann, 832 F.Supp. 663, 669 (S.D.N.Y. 1993); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1916. Absent any such prejudice, the motion for intervention will usually be deemed timely. Miller, 832 F.Supp. at 669.

Concededly, ODLR, Ltd. has had notice of its interest since at least March 9, 2006. See Tashjian Aff. at par. 13. However, when weighed against the other factors of timeliness, ODLR, Ltd.'s motion to intervene should not be deemed untimely. IDC and Saks will not experience any prejudice if ODLR, Ltd.'s motion to intervene is granted. In both the instant action and the ODLR Action, discovery has been substantially completed, see Tashjian Aff. at par. 17, and significantly, ODLR, Ltd is not looking to take any discovery in this action and there is no reason why discovery would be needed by either IDC or Saks. See id.

Unlike the situation in Buxbaum, where the intervenor sought to intervene to vacate a judgment that finally settled the case, here granting ODLR, Ltd.'s motion would likely help facilitate the resolution of this action. See Buxbaum, 216 F.R.D. at 77 (holding that intervention would cause substantial prejudice to existing parties who had already agreed upon settlement after four years of litigation). Saks has taken the position that it cannot pay out any funds to IDC because it faces a substantial risk of multiple or inconsistent obligations arising out of ODLR, Ltd.'s claimed interest to the funds. See Tashjian Aff. at Exh. C, p. 14. ODLR, Ltd.'s intervention would eliminate that risk and could hasten the resolution of this action and the ODLR Action. On the other hand, if ODLR, Ltd.'s motion to intervene is denied, ODLR, Ltd. faces the potential of severe and real prejudice. The distinct possibility exists that any monies recovered by IDC from Saks in this action -- whether by settlement or judgment -- will disappear before ODLR, Ltd. can obtain judgment against IDC the ODLR Action. Given the history between the parties, specifically AGI's willingness to enter into the consent judgment after having fraudulently conveyed it assets, OLDR, Ltd. has every reason to fear its ability to collect on a judgment against IDC.

B. ODLR, Ltd. has an Interest Relating To the Subject Matter of this Action

"A prospective intervenor must demonstrate an interest relating to the property or transaction that is the subject matter of the present action." Werbungs Und Commerz Union

Austalt, 782 F.Supp. at 874. The subject matter of the instant action is unquestionably the monies that Saks allegedly owes to IDC, as the purported assignee of AGI, due to allegedly improper chargebacks and deductions on goods sold to Saks bearing the ODLR, Ltd. trademark. ODLR, Ltd. submits that it "has an interest in, and claim to, the monies being sought" by IDC in this action. ODLR, Ltd.'s position is threefold.

First, whatever monies IDC may recover against Saks was the result of the fraudulent conveyance scheme carried out between and among AGI, HSBC and IDC, and that the funds properly belong to AGI (against whom ODLR, Ltd. has a judgment in the principal amount of $1,008,904.16). Second, IDC is liable to ODLR, Ltd. under the theory of successor liability, so whatever funds IDC recovers from Saks are funds to which ODLR, Ltd. has a rightful claim. Third, ODLR, Ltd. is entitled to receive royalty payments on any monies received by IDC from Saks as calculated in accordance with the license agreement between ODLR, Ltd. and AGI/Sadimara. Under that license agreement AGI/Sadimara were required to pay royalties to ODLR, Ltd. based upon a percentage of their Net Sales, defined to be the gross invoice price of goods less the amounts of credit allowed for returns actually received and normal trade discounts and allowances. If, as IDC alleges in this action, Saks had not wrongfully assessed AGI with unlawful chargebacks, allowances and discounts with respect to the ODLR-trademarked goods sold by AGI to Saks pursuant to AGI's authority under the license agreement with ODLR, Ltd., then AGI's Net Sales number would have been higher, meaning greater royalties would have been paid to ODLR, Ltd.

IDC alleges in its Second Amended Complaint that Saks "knew or should have known that as a result of their withholding payments from AGI based upon the improper and excessive chargebacks, AGI would be unable to make required royalty payments under its license agreement with [ODLR] with the foreseeable result that [ODLR] could then cancel the license agreement." See Tashjian Aff., Exhibit B at par. 56. The fact that Saks has also subpoenaed the transcripts of the depositions of the Mordo Defendants in the instant action shows that they also believe the issues in this action are relevant and material to the issues in the Saks Action.

C. OLDR, Ltd.'s Interest Will Be Impaired Absent Intervention in this Action

Where intervention is necessary to fully protect an intervenor's interest or an unfavorable disposition of the litigation may impair such interest, intervention is appropriate. See Restor-A-Dent Dental Laboratories v. Certified Alloy Products, 725 F.2d 871, 874 (2d Circ. 1984); Home Ins. Co. v. Liberty Mut. Ins. Co., 1990 WL 188925 (S.D.N.Y. 1990) (Kram, J.). The impairment need not be strictly legal in nature, but instead is "simply the degree to which the applicant may be 'practically harmed' by judgment in [the] pending action." Home Ins. Co. v. Liberty Mut. Ins. Co., supra, quoting J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 6.10, at 370 (1985); see also Fed. R. Civ. P. Rule 24(a)(2) ("the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest") (emphasis added).

Here, it is quite possible that the resolution of this action will take place before an adjudication of ODLR, Ltd.'s rights can occur in the ODLR Action. If that happens, and Saks is required to pay IDC monies to which ODLR, Ltd. claims a direct interest in and to, then ODLR, Ltd.'s rights will be impaired upon the dissipation of those funds by IDC. Additionally, if absent, ODLR, Ltd. will not be heard when either IDC or Saks try to cut off ODLR, Ltd.'s claim to the monies from Saks in this action. It can be expected that either IDC or Saks will try to have this Court rule, either explicitly or implicitly, that any recovery to IDC is justified because IDC was the assignee of AGI's claims against Saks. IDC could then try to use that ruling in the

ODLR Action to show that the assignment of AGI assets to IDC was valid. While ODLR, Ltd. would still argue against such a holding in the ODLR Action, "[t]he possibility of a collateral attack by an applicant will not preclude an applicant from demonstrating that his interest would be impaired." See Brody By and Through Sugzdinis v. Spang, 957 F.2d 1108, 1123 (3d Circ. 1992).

D. Neither IDC Nor Saks Can Adequately Protect ODLR, Ltd.'s Interest

The requirement of Rule 24(a)(2) that the applicant's interest is not "adequately represented by existing parties" is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538, 92 S.Ct. 630, 636 (1972). Accordingly, intervention should be allowed unless it is clear that a present party would adequately protect the proposed intervenor's interest. Home Ins. Co. v. Liberty Mut. Ins. Co., supra.

ODLR, Ltd. is aligned with the interest of IDC insofar as IDC is able to recover monies from Saks in this action. However, it certainly is not in ODLR, Ltd.'s best interests for IDC to recover monies directly from Saks absent resolution of ODLR, Ltd.'s right to those monies. Clearly IDC has no interest in advancing ODLR, Ltd.'s claim to the funds. As to Saks, while it has stated that it faces substantial risk of multiple or inconsistent obligations to the monies sought by IDC, and specifically the claims of ODLR, Ltd., Saks too has no vested interest in advancing ODLR, Ltd.'s position of entitlement to those funds.

II.
AS THE CASES SHARE COMMON QUESTIONS OF FACT, INTERVENTION BY PERMISSION SHOULD BE GRANTED

In the event that the Court determines that ODLR, Ltd. cannot intervene as a matter of right, permissive intervention under Federal Rule of Civil Procedure 24(b)(2) is still appropriate. Rule 24(b)(2) provides that intervention may be permitted when "an applicant's claim or defense and the main action have a question of law or fact in common." "The principal consideration set forth in [Rule 24(b)(2)] is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Sackman v. Liggett Group, Inc., 167 F.R.D. 6, 20 (E.D.N.Y. 1996). For the reasons set forth above, this action shares common questions of law and fact with the OLDR Action, and intervention of ODLR, Ltd. will result in no undue prejudice or delay. Therefore, intervention by permission is appropriate.

III.

ODLR, LTD.'S INTERVENTION WOULD NOT DESTROY DIVERSITY JURISDICTION

In its motion for judgment on the pleadings or, alternatively, summary judgment, Saks has taken the position that ODLR, Ltd. is a necessary party whose presence would destroy diversity jurisdiction because ODLR, Ltd., a New York corporation, is adverse to IDC, also a New York corporation. This view presupposes that OLDR, Ltd. would enter this action as a defendant. In determining the alignment of the parties for diversity purposes, however, the Court has a "duty" to "look beyond the pleadings and arrange the parties according to their sides in the dispute." Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (citations omitted); Colonial Penn Ins. Co. v. American Cent. Ins. Co., 1992 WL 350838 (S.D.N.Y. 1992) (Patterson, Jr., J.). It is instead respectfully submitted that taking into consideration the "actual and substantial" interests of the existing parties, ODLR, Ltd.'s interests in the instant action are more closely aligned with IDC's interests than with Saks' interests. Since diversity jurisdiction exists between ODLR, Ltd. and Saks, ODLR, Ltd.'s joinder as a plaintiff would not destroy diversity jurisdiction.

Even if this Court were to disagree and determine that ODLR, Ltd. should be aligned as being adverse to IDC, jurisdiction would still exist under 28 U.S.C. § 1367(b) because ODLR, Ltd.'s claims are so related that they form part of the same case or controversy as the instant action. See Colonial Penn Ins. Co., supra; Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1917.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that ODLR, Ltd.'s motion, pursuant to Rule 24(a) of the Fed. R. Civ. P., to intervene as of right as a plaintiff in this action, or in the alternative, pursuant to Rule 24(b) of the Fed. R. Civ. P., for leave to intervene as a plaintiff in this matter be granted in its entirety, together with such other relief as is just and proper.

Dated: January 15, 2007
New York, New York

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